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IN THE SUPREME COURT OF THE UNITED STATES

No. 880

ROBERT A. KENNEDY, as Treasurer of the State of Arizona, ROY L. THORNBRUGH, as Registrar of Contractors of the State of Arizona, and GARNER ELECTRIC COMPANY,

Petitioners

vs.

LOUISE POWELL, Trustee in Bankruptcy of the Estate of Leon Showalter, bankrupt,

Respondent.

ON PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE

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The State of Florida, through its Attorney General, respectfully submits this Brief as Amicus Curiae under Rule 42 (4), Rules of the Supreme Court, in support of the Petition for Writ of Certiorari filed by the State of Arizona through the Honorable Darrell F. Smith, Attorney General of the State of Arizona.

REASONS FOR GRANTING THE WRIT

ARGUMENT

(1) This case presents a question of substantial importance affecting the administration of the laws of the State of Florida

pertaining to the posting of bonds, cash and/or securities or similar and like forms of properties with officers of the State of Florida.

The State of Florida has certain laws which require the posting of bonds, cash deposits, and/or securities as a condition precedent to being authorized to do business in the State of Florida. In this respect see Chapter 625, Florida Statutes, and more specifically Section 625.0200 and Section 625.0201, Florida Statutes, and Section 255.05, Florida Statutes.

Chapter 625, Florida Statutes, deals with the regulation of the insurance industry within the State of Florida. Generally, it provides that as a condition precedent to being authorized to engage in the insurance business in the State of Florida, insurance companies are required to post certain deposits which may be in the form of securities with the Insurance Commissioner. The purpose of these deposits is stated in Section 625.0201, Florida Statutes. Included among these purposes is the following:

> "A deposit made in this state by a domestic insurer transacting insurance in another state, province or country, and as required by the laws of such state, province or country, shall be held for the protection of the insurer's policyholder or policyholders or creditors."

Said section further provides:

> "Deposits made in this state under Sections 624.0210 (deposit requirement, domestic and foreign insurance) and 624.0211 (deposit of alien insurers) shall be held for the purposes stated in the respective sections."

Section 624.0210, Florida Statutes, provides in effect that this deposit is deposited in trust with the Insurance Commissioner (State Treasurer) *for the protection of the insurer's policyholder or its policyholders and/or creditors.*

The decision reached by the United States Court of Appeals for the Ninth Circuit from which this Petition for Certiorari has

been initiated would severely jeopardize the state's administration of these required deposits, bonds and/or securities.

The State of Florida, through its police power, maintains strong regulation over insurance companies. The purpose of this regulation is to protect policyholders and claimants who become involved with insurance companies and suffer injury thereby. This includes both first and third party claimants.

The result reached by the United States Court of Appeals for the Ninth Circuit was that the $500.00 bond posted *was property* within the purview of the federal bankruptcy law found in Title 11, U.S.C.A., Section 70a and 110 (a) (5). The effect of this conclusion would mean that these deposits of securities posted with the Insurance Commissioner of the State of Florida would then become property of the trustee in bankruptcy and would consequently be administered by the trustee as part of the bankrupt assets. The result of such conclusion could well mean that Florida policyholders and claimants who had claims against defunct insurance corporations would be placed in a category along with policyholders in other states who have not seen fit to provide, through their police power, for deposits in the form of cash, bonds or securities for the protection of the policyholders or claimants of their states.

Such a conclusion would frustrate the entire purpose of the insurance laws of the State of Florida.

A similar result would obtain insofar as the other cited Florida Statute provisions are concerned. The result would be that the legislative purposes would be frustrated.

Not only would the overt legislative purpose be frustrated, but the administration by the Insurance Commissioner (State Treasurer) would be virtually impossible. This is so because in many instances an insurance corporation may file bankruptcy proceedings in some state *other than* in the State of Florida. The Insurance Commissioner would have no way of knowing that

bankruptcy proceedings had been filed and might very well go ahead and settle claims filed by Florida policyholders in a normal state receivership insurance action, or, as is frequently done, in an insolvency proceeding handled at the state level. This would place the Insurance Commissioner in the position of never knowing whether or not he was in a posision to completely settle outstanding claims against an insolvent insurance company. It might well place him in the position of being called upon to make accounting to a trustee in bankruptcy for having so settled and disbursed assets claimed by the trustee. This is so since there is no duty placed on a bankrupt or the bankruptcy court to notify each individual state of pending bankruptcy proceedings.

Section 255.05, Florida Statutes (Appendix A), provides for a bond of a contractor constructing public buildings. It provides in effect that before any person enters into a formal contract with the state, any county of said state, or any city in said state, or any political subdivision thereof, they shall execute a bond with good and sufficient securities. This bond is for the benefit of subcontractors and materialmen who supply labor, material and supplies going into the construction of public projects. This is specifically provided for in the statute.

It has been held that the purpose of this section is to protect those who incorporate their labor and material in the public work. It has also been held that this provision was intended to protect laborers and materialmen who incorporate their labor and materials in public buildings. See *Westinghouse Electric Corporation v. Clutter,* 132 So. 2d 21, 1961), affirmed 139 So. 2d 426; *Woodalls v. Varn,* 106 Co. 2d 634, and *Fulghum v. State,* 92 Fla. 662, 109 So. 644.

Following this construction that this statute was intended to benefit specific persons, or a specific class of persons, it has been held that one who supplies rental equipment to materialmen who use this equipment for extracting materials in turn furnished to

general contractors is *not* entitled to recover, under the construction completion bond, for the unpaid rent on the equipment. See *Troup Bros., Inc. v. State, for use and benefit of Meadow's Southern Construction Co.,* 135 So. 2d 755.

Note that the theory here is that the state holds this bond in *trust* for a *specific* class or classes of individuals. This is a trust arrangement. Consequently, it would follow that it could only be terminated by the instance the bond is returned or automatically terminated at the conclusion of a given period of time after the completion of the job. Such a bond or deposit is clearly not subject to any control whatsoever of the contractor *until* the occurrence of the event or the elapse of time which completes the trust.

Section 494.04(12), Florida Statutes (Appendix B), applicable to the licensing of mortgage brokers and mortgage solicitors, is very similar in its terms with the statute of Arizona involved in these proceedings. Its applicability here is contained in the provision that:

> "* * * The bond shall run to the state for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the broker or its solicitors * * *."

The conclusion reached by the Ninth Circuit Court of Appeals is entirely inconsistent with the construction which has been placed on these Florida Statutes by Florida courts. It is fundamental that in construing these Florida Statutes the Federal Court should look initially to the construction placed on the Florida Statutes by Florida State Courts.

(2) The conclusion reached by the United States Court of Appeals for the Ninth Circuit is inconsistent with other federal law on the point.

The case of *In Re Goldsby,* 51 Fed. Supp. 849, involved a deposit which had been placed with the Commissioner of Agriculture of the State of Florida, conditioned for the benefit of citrus producers as required by state law. The issue raised in that case is

identical to that issue raised in the case presently before the court. That case found that the surety bond was *not* within the purview of Section 110, 11 U.S.C.A., of the bankruptcy law and was *not* property as defined therein. In said case it is stated:

> "A trustee in bankruptcy can recover only such property as the bankrupt could have controlled and collected personally at the time when his right passed to his successor. Otis v. Springfield Fire and Marine Insurance Co., 122 Me. 239, 119 Atl. 612."

This case relied on the case of *Betzer v. Olney,* 14 Cal. App. 2d 53, 57 P. 2d 1376.

In this case a bankrupt had posted a bond pursuant to the corporate securities act of California. Proceeds of the bond were sought to be acquired by the trustee in bankruptcy as an asset of the bankruptcy estate. That case held that the bond carried with it a definite contractural right to the beneficiaries *under the bond* and that such right "was neither directly nor indirectly a part of the assets of the bankruptcy estate."

CONCLUSION

The State of Florida respectfully urges this court to grant the Petition for Certiorari filed herein by the State of Arizona.

Respectfully submitted,

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APPENDIX A

Section 255.05 (1), Florida Statutes

255.05 Bond of contractor constructing public buildings; suit by materialmen, etc.—

(1) Any person entering into a formal contract with the state, any county of said state, or any city in said state, or any political subdivision thereof, or other public authority, for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building, or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor shall promptly make payments to all persons supplying him labor, material and supplies, used directly or indirectly by the said contractor, or subcontractors, in the prosecution of the work provided for in said contract; and any person, making application therefor, and furnishing affidavit to the treasurer of the state, or any city, county, political subdivision, or other public authority, having charge of said work, that labor, material or supplies for the prosecution of such work has been supplied by him, and payment for which has not been made, shall be furnished with certified copy of said contract and bond, upon which, said person, supplying such labor, material or supplies shall have a right of action, and may bring suit in the name of the state, or the city, county, or political subdivision, prosecuting said work, for his use and benefit, against said contractor, and sureties, and to prosecute the same to final judgment and execution; provided, that such action, and its prosecution, shall not involve the state, any county, city or other political subdivisions, in any expense.

APPENDIX B

Section 494.04 (12), Florida Statutes

(12) Every person, firm, association, or corporation licensed as a mortgage broker, shall deposit with the commissioner prior to doing business as such, a bond in the amount of five thousand dollars, executed by the mortgage broker as principal and a surety company authorized and licensed to do business in the state, as surety. The bond shall be conditioned upon the faithful compliance of the broker so licensed with the provisions of this act and that he will conduct the business of a mortgage broker in a reliable and dependable manner. The bond shall run to the state for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the broker or its solicitors. Before any person, firm, association or corporation shall have any right of action or any right whatsoever against the principal or the surety under the bond and before any such right of action or any such right whatsoever shall exist or arise, such person, firm, association or corporation, within a period of five years after the termination or cancellation of the bond must have given to the commissioner, the surety and the principal written notice of claim under the bond. The giving of such notice of claim under the bond within said period of five years shall be a condition precedent to any righe of action or right whatsoever against the principal or the surety and the failure to give such notice as aforesaid shall render the obligation null and void and of no effect as to such person, firm, association or corporation. Only one bond shall be required of any person, firm, association, or corporation irrespective of the number of mortgage brokers employed by or who are members of said firm, association, or corporation.